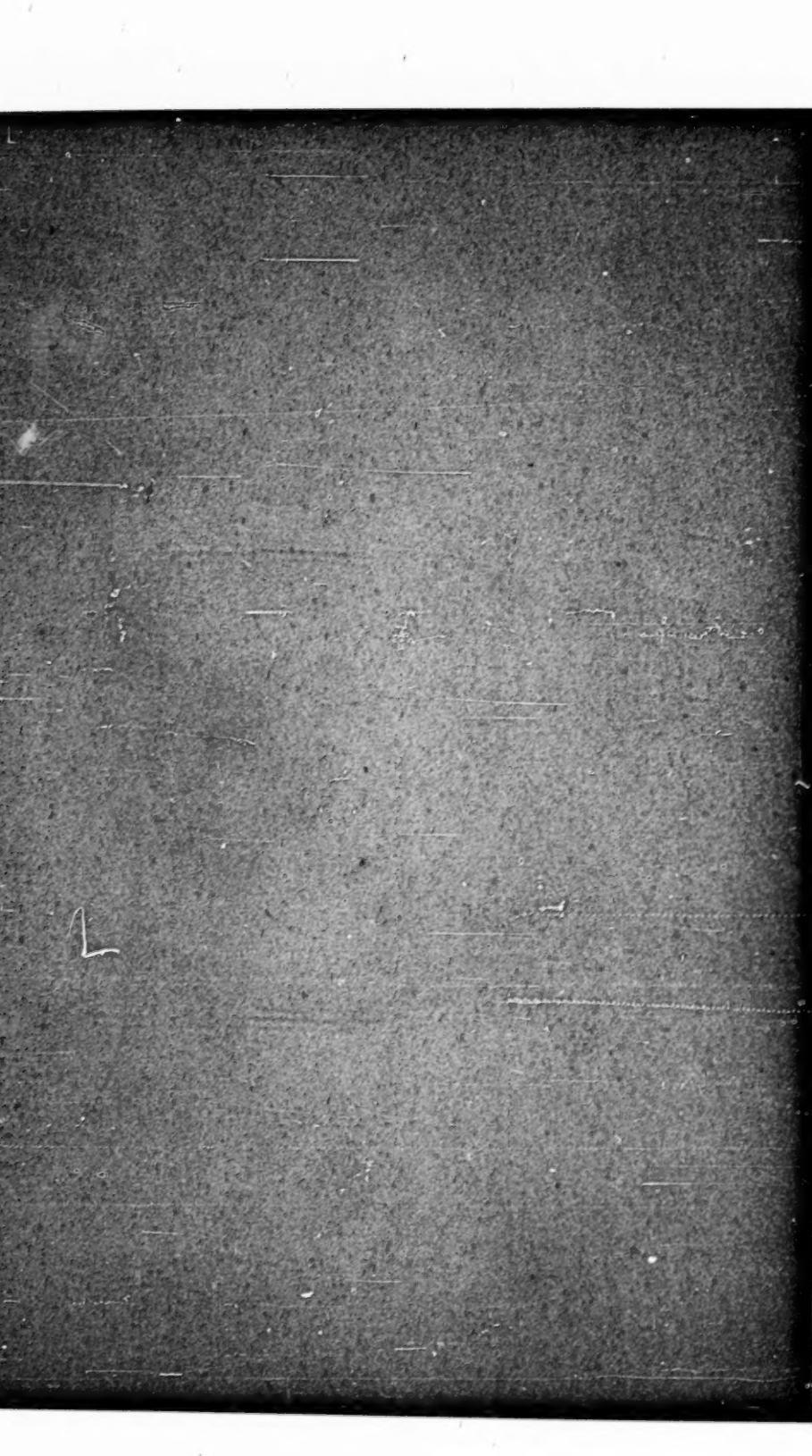

SUPREME COURT, U. S.
SEP 27 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1935

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually, *Petitioners*,

v.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN, *Respondents*.

RESPONDENTS' BRIEF IN REPLY TO PETITIONERS' REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

WILLIAM M. O'BRYAN
FRANK E. MALONEY, JR.
FLEMING, O'BRYAN & FLEMING
American National Bank Bldg.
Fort Lauderdale, Fla. 33304
764-3000, 945-2686
Attorneys for Respondents

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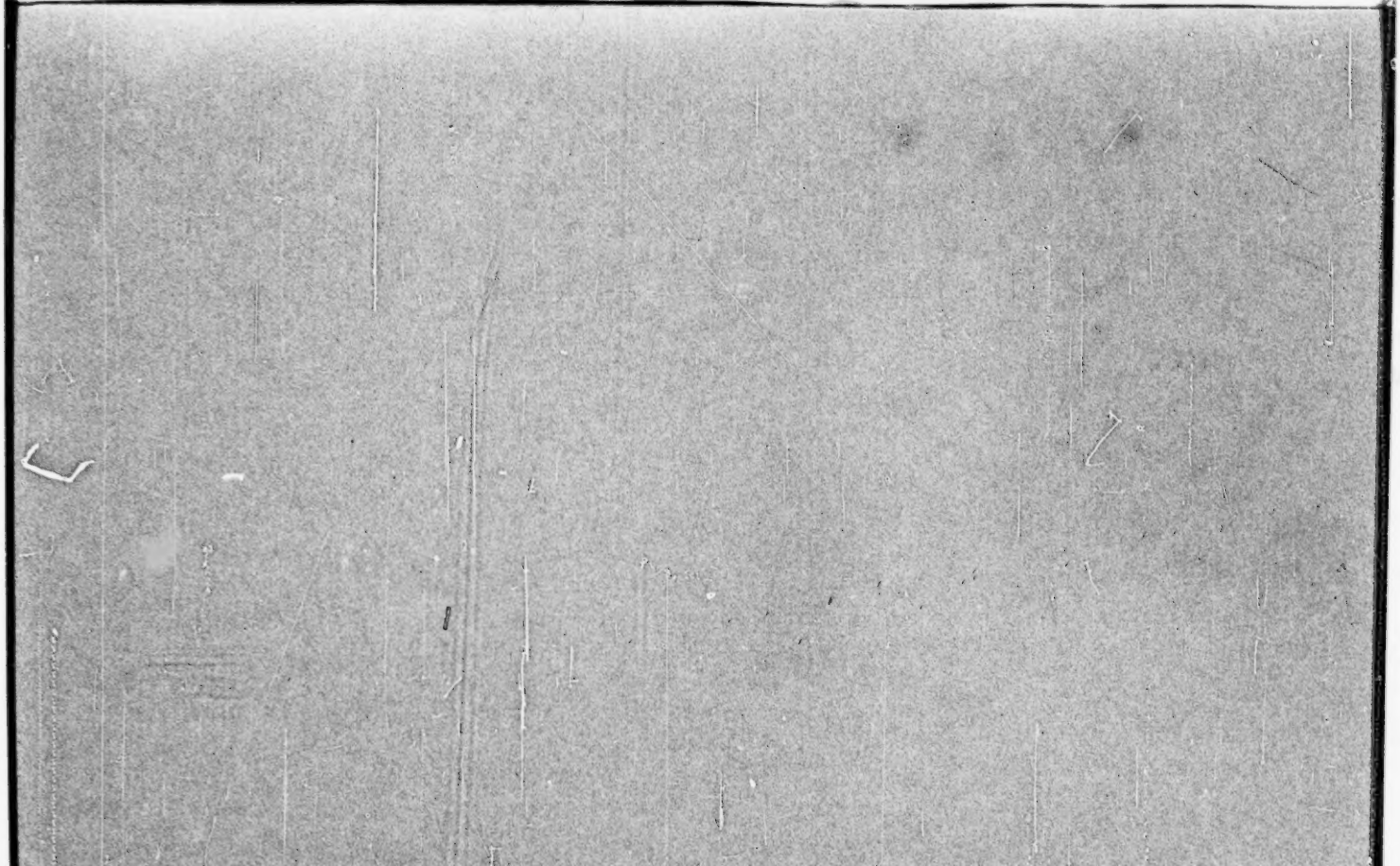

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PREFACE

This brief is filed by Respondents CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN, pursuant to Rule 24 (4), United States Supreme Court Rules, in response to the "Reply and Supplemental Brief" of petitioners.

The petitioners have asserted that said brief, dated September 10, 1974, is filed pursuant to Rule 24; however, the brief does not comply with the provisions set forth for reply briefs as found in Rule 24(4) or for supplemental briefs as found in Rule 24 (5).

The "Reply and Supplemental Brief" does not respond to any "arguments first raised in the briefs in opposition". The petitioners' brief instead raises new argument in addition to that found in the petition for certiorari and the response brief of respondents.

The cases cited in petitioners' brief are not "new" *and* "intervening" cases decided since the petition for writ of certiorari was filed with this Court. The petitioners have relied on two additional cases:

Healy v. *Edwards,* 363 F. Supp. 1110 (E.D. La., 1973) (decided August 31, 1973); and

Hoffman v. *Jones,* 280 So. 2d 431 (Fla., 1973) (decided July 10, 1973).

Both of these cases were well over a year old and had long since been reported at the time the petitioners filed their "Reply and Supplemental Brief".

The petitioners are neither in compliance with the letter nor the spirit of this Court's rules.

The parties will be referred to as they were in respondents' brief in opposition to petition for certiorari to the Supreme Court of Florida and the same symbols will be used as were used in that brief. All emphasis is that of the respondents, unless otherwise indicated.

ARGUMENT

I

The Exclusion of Persons 18, 19 and 20 Years of Age from Jury Venires Prior to July 1, 1973, and the Requiring of Individuals Over the Age of 65 Waiving Personal Exemption Is Not in Conflict with the Fourteenth Amendment to the United States Constitution.

The petitioners have asserted as the crux of their argument that "the time has come to abandon any similar classification based on age, as irrational . . .".

From the petitioners' argument it appears that they have not kept abreast of developments in Florida and in Broward County, in particular, in the selection of jury venires since this case was tried in February of 1972.

A year and a half after the trial and after the appeal was taken to the Florida Fourth District Court of Appeal, the Florida legislature removed all disabilities of non-age to persons in Florida who were eighteen years of age or older by Chapter 73-21, Laws of Florida (Section 1.01 (14), F.S.). Thus, subsequent to July 1, 1973, jury venires throughout the State of Florida were made up of individuals over the age of eighteen who were registered to vote and with no exemption from service for those individuals over the age of sixty-five:

> 40.01 Qualifications and disqualifications of jurors.—
>
> *(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state and who have resided in this state for one year and in their respective counties for six months and who are fully qualified electors of their respective counties; provided, however, that expectant mothers and mothers with children under eighteen years of age, upon their request, shall be exempted from grand and petit jury duty.

---

* *Note*—Ch. 73-21, Laws of Florida, removed the disability of non-age for persons 18 years of age and older.

cf.—§ 1.01(14) Definition of minor.

§ 743.07 Rights, privileges and obligations of persons 18 years of age or older.

So that there would be as little lag time as possible in implementing this change of status for those persons

eighteen, nineteen and twenty years old, the various Supervisors of Elections were each specifically informed of the legislative change and directed to include these new adults on jury venires. This July 1973 change has now been fully implemented. See *Reed* v. *State,* 292 So. 2d 7 (Fla., 1974).

The petitioners have implied that persons over the age of sixty-five are still not included on jury venires without requesting to serve. This simply is not true. The Florida Legislature has repealed all but two of the original personal exemptions from jury duty: practicing attorneys (Section 40.08, F.S.) and expectant mothers or mothers with children under eighteen years of age (when request is so made). No other categories of exemptions exist in Florida today.

As was pointed out in the respondents' brief in opposition to the Petition for Writ of Certiorari, the exemption for individuals over the age of sixty-five was repealed prior to the time of this trial. However, due to lack of notification of this repeal and certain lag time in making up new jury venires, these individuals had not yet been included on the venire that was used at the time of this February 1972 trial.

The Florida Supreme Court has held that this lag in implementation of the legislative changes in the composition of jury venires is constitutional, relying on authorities pronounced by this Court. See *Reed, supra.* The repeal of personal exemptions for individuals over the age of sixty-five from jury service is in force throughout the whole State of Florida.

The case of *Healy* v. *Edwards,* 363 F. Supp. 1110 (E.D. La., 1973), relied on by petitioners, is totally

inapplicable to Florida juries. In 1967 the Florida legislature repealed the personal exemption for women and replaced it with the current exemption for expectant mothers and those mothers with children under eighteen years of age requesting such exemption. See Chapter 67-154, Laws of Florida, or Section 40.01(1), F.S.

If the *Healy* case, *supra,* had been tried in Florida, that three-judge panel would have found that Florida had been in compliance with their opinion for the last seven years.

Respondents suggest that there was no constitutional taint on the jury venire in this case and that the petition for writ of certiorari should be denied.

II

The United States Supreme Court Should Not Reverse This Cause and Remand It for a New Trial in Accordance with the Doctrine of Comparative Negligence Adopted by the Florida Supreme Court Subsequent to the Trial of This Cause.

The case of *Hoffman* v. *Jones,* 280 So. 2d 431 (Fla., 1973) (A. 1a-22a), relied on by petitioners, simply has no application whatsoever to the instant case.

The petitioners have either totally misinterpreted the holding of the Florida Supreme Court in *Hoffman, supra,* or are misstating the ruling of the Florida Supreme Court to this Court.

The Florida Supreme Court went to great lengths to hold that its decision in *Hoffman, supra,* would not be applied retroactively, but would only be applied to future cases, cases then pending, and cases on appeal

in which the points had been appropriately raised *at the trial court,* at page 440:

> [16] Under the circumstances, we hold that this opinion shall be applied as follows:
>
> 1. As to those cases in which the comparative negligence rule has been applied, this opinion shall be applicable.
>
> 2. As to those cases already commenced, but in which trial has not yet begun, this opinion shall be applicable.
>
> 3. *As to those cases in which trial has already begun or in which verdict or judgment has already been rendered, this opinion shall not be applicable,* unless the applicability of the comparative negligence rule was appropriately and properly raised during some stage of the litigation.
>
> 4. As to those cases on appeal in which the applicability of the comparative negligence rule *has been properly and appropriately made a question of appellate review,* this opinion shall be applicable.
>
> 5. This opinion shall be applicable to all cases commenced after the decision becomes final.

At no time during the proceedings in the trial court did the petitioners make any request having the slightest thing to do with comparative negligence, nor did they raise comparative negligence in the District Court of Appeal or Supreme Court of Florida proceedings.

The respondents suggest that the petitioners do not come within the confines of the Florida Supreme Court's holding in *Hoffman, supra,* and that the petition for writ of certiorari should be denied.

CONCLUSION

Based on the authorities and arguments cited herein, it is respectfully suggested that the petition for writ of certiorari be denied.

Respectfully submitted,

WILLIAM M. O'BRYAN
FRANK E. MALONEY, JR.
FLEMING, O'BRYAN & FLEMING
American National Bank Bldg.
Fort Lauderdale, Fla. 33304
764-3000, 945-2686
Attorneys for Respondents